89-547

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF OHIO,

Petitioner

vs.

TERESA BOOHER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHERE A VIOLATION OF AN ACCUSED'S RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION HAS OCCURRED, MAY A TRIAL COURT PROPERLY FIND THAT A SUBSEQUENT CONFESSION IS ADMISSIBLE AT TRIAL IF THE CONFESSION WAS GIVEN TO A PARTICULAR DETECTIVE AT THE REQUEST OF THE ACCUSED APPROXIMATELY TWO HOURS AFTER THE VIOLATION AND AFTER HAVING BEEN ADVISED OF HER *MIRANDA* RIGHTS ON ELEVEN SEPARATE OCCASIONS PRIOR TO THE MAKING OF THE CONFESSION?

II.

WHETHER A STATE APPELLATE COURT CAN REVERSE A STATE TRIAL COURT'S DECISION NOT TO SUPPRESS A CONFESSION WHEN THE CONFESSION WAS GIVEN BY THE ACCUSED TO A PARTICULAR DETECTIVE AT HER REQUEST AFTER BEING REPEATEDLY ADVISED OF HER *MIRANDA* RIGHTS AND AFTER THE TRIAL COURT HAD DETERMINED THAT THE CONFESSION WAS GIVEN FREELY AND VOLUNTARILY AND WAS NOT TAINTED BY AN EARLIER PERIOD OF QUESTIONING DURING WHICH THE ACCUSED'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION HAD BEEN VIOLATED.

III.

SHOULD THE EXCLUSIONARY RULE RELATING TO STATEMENTS BE ABOLISHED AS IT CAUSES SUPPRESSION OF STATEMENTS FINDING THEM TO BE NON-CREDIBLE; AND CREDIBILITY AS IT RELATES TO GUILT OR INNOCENCE BE WITHIN THE PROVINCE OF TWELVE TRIERS OF FACT, THE JURY?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: Page

Miscellaneous Cites:

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OPINION BELOW

The opinion of the Court of Appeals of the Third Appellate District of Ohio, released on September 15, 1988, appears in the appendix hereto.

JURISDICTION

The Judgment for the Court of Appeals of the Third Appellate District of Ohio was entered on September 15, 1988. The Judgment of the Supreme Court of Ohio was entered on July 5, 1989, and the Judgment of the Supreme Court of Ohio on the Petitioner's Motion for Reconsideration was entered on August 4, 1989. The Petition is timely filed and this Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and other appropriate jurisdictional statutes and rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

a) Proceedings in the Supreme Court of the State of Ohio

On February 13, 1989, Petitioner filed a Brief with the Supreme Court of the State of Ohio alleging the following Propositions of Law:

I. When a confession is so far removed in time and manner from an earlier period of questioning so as to dissipate the effect of any coercive elements upon the free will of the Defendant which existed during that period of questioning and when this confession was given immediately after being advised of one's *Miranda* Rights, it is admissible as a volitional act on the part of the Defendant.

II. When substantial credible evidence has been presented to support a judgment in a Trial Court, an Appellate Court abuses its discretion when it substitutes its judgment for that of the Trial Court as to the weight of the evidence and when it disregards the facts as determined by the trier of fact and substitutes its opinion regarding those facts.

On July 5, 1989, the Supreme Court of the State of Ohio dismissed the case *sua sponte*, as having been improvidently allowed. A Motion for Reconsideration was immediately filed by Petitioner and subsequently denied on August 4, 1989. (See Appendix Page 31a)

b) Proceedings in the Court of Appeals for the Third Appellate Judicial District of Ohio.

On November 20, 1987, Respondent Booher filed an Appellate Brief alleging the following four Assignments of Error:

I. The Trial Court erred by denying the Defendant effective assistance of Counsel.

II. The Trial Court erred in failing to grant Defendant's Motion to Suppress the statements and alleged con-

fession given to various law enforcement officers on February 21, 1986, relating to the death of her husband.

III. The Trial Court erred in failing to grant Defendant's Motion for Change of Venue.

IV. The Trial Court abused its discretion by failing to grant Defendant's Motion for New Trial.

The Appellate Court rejected the arguments which were set forth by the Defendant in Assignments of Error I, III, and IV, but ruled that the Trial Court had erred in failing to grant the Defendant's Motion to Suppress the second statement and alleged confession given to Detective Wood of the Defiance City Police Department and reversed the judgment of the Trial Court and sent the cause back to the Trial Court for further proceedings. (See Appendix Page 1a)

c) Proceedings in State Court.

Respondent Teresa Booher was arrested on February 20, 1986, and charged with premeditated murder of her husband, Patrolman Gary Booher. Respondent was indicted in the Defiance County Court of Common Pleas on one count of Aggravated Murder with a Specification for use of a firearm during the commission of the crime. A Suppression Hearing was held on April 19, 1986, at which time Judge Sumner Walters, sitting on assignment in the Defiance County Court of Common Pleas, ruled that all statements that were elicited from Respondent prior to midnight on February 20, 1986, were inadmissible at Trial, but that the statements which were given to Detective G. W. Wood between 2:15 a.m. and 4:00 a.m. on February 21, 1986, were admissible at Trial. (See Appendix Page 32a) Respondent's case was tried before a Jury on June 9, 1986, in the Defiance County Court of Common Pleas. The trial concluded on June 11, 1986, and Respondent was found guilty of Aggravated Murder with a Specification for use of a firearm during the commission of the crime.

d) Facts

On February 20, 1986, at approximately 11:30 a.m. Respondent Teresa Booher phoned the Definance City Police Department and informed the dispatcher that her husband, Gary Booher, a patrolman with the Defiance City Police Department, had been shot in their home. When the rescue unit and police officers arrived at the Booher residence they were taken to a bedroom where they discovered the body of the victim lying in his bed with his head between two pillows with a gunshot would through the top pillow to the rear of his head. The Defiance County Coroner was immediately summoned to the residence and pronounced the victim dead.

Respondent was taken to the Defiance City Police Department for questioning about the murder. Even though Respondent was not a suspect at that time she was advised of her *Miranda* Rights before the questioning began. As the questioning progressed, however, Respondent began to give inconsistent versions of the facts surrounding her husband's death. First, she denied having knowledge as to how her husband had been killed. Sometime later, however, she stated that it was she who had shot her husband but that the shooting had been an accident resulting from a sex game called "cops and robbers." Also, during this conversation she stated that her husband was awake when the accident occurred, but later changed her story stating that he was asleep when she fired the gun. Further, Respondent at first claimed that she did not know how the gun had been loaded, but later stated that it was in fact she who had loaded the gun.

At approximately 11:00 p.m., Respondent stated she "thought" she ought to get an attorney. She was provided a copy of the phone book yellow pages, but did not make a phone call. Following this request, the Chief of Police Robert Shock and Detective G. W. Wood questioned her further to attempt to elicit additional information. During the course of this questioning, Respondent continued to claim that the shooting was an accident, and did not change her story in any manner whatsoever.

At approximately 12:00 p.m. Respondent was served with a Warrant for her Arrest for Aggravated Murder and was placed in the Defiance County Jail. After two hours of thought and contemplation Respondent summoned the female jailer and informed her that she wanted to speak with Detective Wood. Detective Wood was notified of this request and upon arrival at the Police Department Respondent stated to him "I want to ask you a couple of questions" and "you can still help me?" At that point Detective Wood readvised her of her *Miranda* Rights. Respondent acknowledged that she understood these rights and desired to waive them. This same warning was given by Detective Wood to Respondent on numerous occasions throughout the course of their conversation and on each occasion Respondent replied that she understood her rights and wished to waive them. During the course of the conversation that ensued, Respondent indicated in independent, accurate detail that she had loaded the pistol and had gone into the bedroom where her husband was sleeping and placed the gun against the pillow and his head and pulled the trigger.

The Respondent subsequently filed a Motion to Suppress all of her statements. This Motion was heard on April 19, 1986, by Judge Sumner Walters in the Defiance County Court of Common Pleas. At that hearing, represented by counsel, and under oath, the Respondent stated that as to the confession given at 2:15 a.m. she still felt her rights were valid, that she knew she did not have to speak, and that she still had a right to a lawyer if she wanted one. Respondent stated she chose to waive those rights. After listening to the testimonial evidence of those involved in the questioning process, including Respondent, herself, and after reviewing the waiver of rights and the transcript of the confession and all related conversations with members of the Defiance City Police Department, the Court found that the Respondent's statements, that were given to law enforcement officers prior to 12:00 midnight on February 20, 1986, were inadmissible, but that her statement that was given to Detective Wood between 2:15 a.m. and

4:00 a.m. on February 21, 1986, was admissible. (See Appendix Page 32a)

On June 9, 1986, Respondent's case was tried in the Defiance County Court of Common Pleas. The State in its case in chief called Detective G. W. Wood, who testified about the confession that was given to him by Respondent during the early morning hours of February 21, 1986. Thereafter, Respondent took the stand and used as her defense the original statement that the death of her husband was a result of an accident, the very statement the Trial Court had previously suppressed. The Jury returned with a verdict of guilty to Aggravated Murder with a Firearm Specification and Respondent was subsequently sentenced to life imprisonment.

On November 20, 1986, Respondent filed an Appellate Brief with the Court of Appeals of the Third Appellate Judicial District of Ohio alleging, among other things, that the Trial Court erred in failing to grant Respondent's Motion to Suppress all the statements and confession given to law enforcement officers on February 20, and 21, 1986, relating to the death of her husband. On September 15, 1988, the Court of Appeals of the Third Appellate Judicial District of Ohio ruled that the Trial Court had erred when it failed to grant Respondent's Motion to Suppress her statements and confession and reversed the judgment and remanded it to the Trial Court for further proceedings. (See Appendix Page 1a)

Petitioner subsequently appealed the decision to the Ohio Supreme Court. The case was intially allowed, briefed and orally argued. Then on July 5, 1989, the cause was dismissed *sua sponte* by the Supreme Court of the State of Ohio, as having been "improvidently allowed." A Motion for Reconsideration was filed by Petitioner and was subsequently denied on August 4, 1989. (See Appendix Page 31a) This Petition for Writ of Certiorari is in response to the decisions of the Court of Appeals of the Third Appellate Judicial District of Ohio and the Supreme Court of the State of Ohio.

REASON FOR GRANTING THE WRIT

WHERE A TRIAL COURT FINDS THAT AN ACCUSED INITIATED A CONVERSATION WITH POLICE BY REQUESTING TO SPEAK TO A PARTICULAR DETECTIVE ABOUT AN OFFENSE AND THEN WAIVED HER RIGHTS ON ELEVEN SEPARATE OCCASIONS BEFORE GIVING A CONFESSION TO THE DETECTIVE, THE TRIAL COURT DOES NOT ERR IN FINDING THE CONFESSION ADMISSIBLE DESPITE AN EARLIER VIOLATION OF THE ACCUSED'S RIGHT TO THE PRESENCE OF COUNSEL DURING CUSTODIAL INTERROGATION.

a) Introduction

The Respondent was tried and ultimately convicted for the premeditated murder of her husband, Patrolman Gary Booher of the Defiance City Police Department. The most damaging evidence introduced at Trial by the State of Ohio was a confession which had been given by the Respondent to Detective G. W. Wood of the Defiance City Police Department, Detective Bureau, wherein she admitted to the murder of her husband. This confession was given during the early morning hours of February 21, 1986, less than twenty-four hours after her husband had been fatally shot. Respondent had been questioned by law enforcement officers of the Defiance City Police Department and the Defiance County Sheriff's Department on an on and off basis during the preceding afternoon and evening, with the total actual questioning consisting of just over eight (8) intermittent hours. At approximately 11:00 p.m. on February 20, 1986, Respondent requested the presence of an attorney during further custodial interrogation. This request, however, was not honored. The Chief of Police and Detective Wood questioned her for additional information until approximately midnight when she was taken to a cell at the Defiance County Jail. At *no* time during that questioning did she change her story in any manner whatsoever. After sitting by herself in the jail cell for ap-

proximately two hours, Respondent made a request to again speak with Detective Wood. Upon Detective Wood's arrival at the Police Station, Respondent asked him "can I ask you a couple of questions" and "you can still help me?" Before any conversation with her, Detective Wood immediately readvised her of her *Miranda* Rights. After stating that she understood these rights and wished to waive them, she began to discuss the case again with the Detective. During the course of this discussion, Respondent confessed to the murder of her husband.

b) Law

A violation of an accused's right to counsel during custodial interrogation does not automatically preclude the admission of a subsequent confession, if the accused initiated the conversation during which the subsequent confession was given, the accused was advised of her *Miranda* Rights prior to the confession, and the totality of the circumstances surrounding the confession indicate that the confession was voluntarily given. This proposition of law is supported by a line of cases that have defined the scope of the *Miranda* Rule making it less rigid and more difficult for criminals to escape punishment when the circumstances surrounding the subsequent inculpatory statement indicate that the confession had been given voluntarily.

This attempt to define the scope of the *Miranda* Rule began in 1981 when this Court held in *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), that an accused could waive his right to counsel during custodial interrogation after having previously invoked that right. Specifically, the Court noted that:

> an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S. at 484, 485, 101 S.Ct. at 1885.

Not long after this decision was handed down this Court clarified what constituted "further communication, exchanges or conversations." In *Oregon* v. *Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830 (1983), this Court noted that a waiver of an accused's previously invoked right to counsel during custodial interrogation occurs when the accused has expressed "a willingness and a desire for a generalized discussion about the investigation." It further noted that any statement made by the accused following such a waiver is admissible if, in light of the surrounding circumstances, the waiver was made knowingly and intelligently. 462 U.S. at 1046, 103 S.Ct. at 2835. In *Bradshaw* it was determined by this Court that a statement such as "well, what is going to happen to me now," constituted a willingness and a desire to carry on a generalized conversation about the case. 462 U.S. at 1045, 1046, 103 S.Ct. at 2835. Further, since the accused initiated the conversation with the police and gave an inculpatory statement after being advised of his *Miranda* Rights, and since he was not threatened or physically coerced into making the statement, the totality of the circumstances surrounding the inculpatory statement indicated to the Court that his waiver was knowingly and intelligently made. 462 U.S. at 1046, 103 S.Ct. at 2835.

These facts are very similar to those in the case before this Court. Respondent Teresa Booher had invoked her right to representation of counsel at approximately 11:00 p.m. on February 20, 1986. At approximately 2:00 a.m. on the following morning, after summoning Detective Wood to the Police Station, she immediately asked "can I ask you a couple of questions" and "you can still help me?" At that point Detective Wood interpreted these questions from the Respondent as a willingness and a desire to carry on a generalized discussion about the investigation. Also, the facts surrounding this waiver indicate that it was given knowingly and intelligently. Before Detective Wood allowed her to proceed, he readvised her of her *Miranda* Rights and did so on numerous occasions throughout the subsequent discussion. No threats

were made to induce the Respondent into making a statement and Detective Wood was at the Police Station at the request of the Respondent, who had been left alone in a jail cell to contemplate the events of the preceding day. Further, as indicated previously, the Respondent at a subsequent Suppression Hearng while under oath and represented by counsel, testified under cross-examination by the prosecutor that at that time she believed her right to silence and to appointed counsel were still valid and that she knowingly chose to waive those rights. (See Appendix Page 38a)

For some reason the Court of Appeals for the Third Appellate District of Ohio refused to consider the reinitiation of the conversation by the Respondent and instead focused its attention on the *Miranda* violation that had occurred earlier. Specifically, the Court noted:

> Here we are not concerned with the request of appellant made through the jailer to speak with Detective Wood but are concerned with what occurred when prior to midnight she initially requested counsel. As we have noted, the requirement of *Miranda* that "all interrogations cease until an attorney is present" was *not* observed. We have already quoted the statement of the prosecutor to the effect that at that time, there being no waiver or anything that could be construed as a waiver, the questioning continued by the Chief of Police Shock, by Wood and possibly by the prosecutor. This was done deliberately and, apparently, as a matter of policy.
>
> We consider this a flagrant disregard of appellant's rights. Moreover, the effect of this action was such as to effectively render for the appellant the frequent statements (estimated to be eleven times) of *Miranda* Rights meaningless. Having been told she had a right to remain silent and to have an attorney, when that right was asserted it was ignored by her interrogators, no attorney was provided, but interrogation continued. Such events necessarily would place in the mind of the ap-

> pellant serious doubts as to whether assistance of counsel had any meaning, or would, in fact, be forthcoming. (See Appendix Page 22a)

In summation, the Court of Appeals has taken the position that once an accused has invoked his right to counsel during custodial interrogation and once that right is violated it cannot be subsequently waived.

In opposition to this decision, Petitioner contends, as stated earlier, that the holding in *Edwards* has established that a right to representation of counsel during custodial interrogation can be subsequently waived. Unfortunately, the Supreme Court in *Edwards* did not have the opportunity to decide whether that right to counsel could be waived if it had not been honored in the first place. This issue was left undecided until 1985 when this Court in *Oregon* v. *Elsted*, 407 U.S. 298, 105 S.Ct. 1285 (1985), held that a confession, which was given to the police a short period of time after a *Miranda* violation, was admissible, even though the accused was not made aware that his prior confession was inadmissible. In so holding, this Court refused to uphold the argument that a violation of an accused's *Miranda* Rights taints all subsequent statements made by the accused. In support of this position the Court noted that a violation of one's *Miranda* Rights does not necessarily constitute a violation of an individual's Fifth Amendment privilege against self-incrimination. 470 U.S. 316, 105 S.Ct. 1297. In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Court established a nonconstitutional prophylactic rule to deter misconduct on the part of law enforcement officers in obtaining confessions. Since the rights enumerated by this Court in *Miranda* are broader than those prescribed by the Fifth Amendment, a violation of *Miranda* does not necessarily mean that the accused's Fifth Amendment privilege against self-incrimination has been violated. In other words, an otherwise volitional statement, that would have been admissible if the standards of the Fifth Amendment were applied, may nevertheless be technically inad-

missible because of a *Miranda* violation. This is precisely the case in *Elsted*. Although the accused was not advised of his *Miranda* Rights, his confession nevertheless met the standards of voluntariness as set forth by the Fifth Amendment. Therefore, since his Fifth Amendment privilege against self-incrimination was not violated the subsequent confession was not tainted and the proper inquiry was whether the second confession was voluntarily made. In making this determination the Court looked to the circumstances surrounding the subsequent confession and noted that:

> As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing taint to subsequent statements obtained pursuant to a voluntary and knowing waiver. 407 U.S. at 318, 105 S.Ct. at 1298.

Similarly, in the case at issue, Respondent Teresa Booher was denied her representation of counsel during a portion of custodial interrogation. Although the conduct on the part of those who questioned her constituted a violation of her *Miranda* Rights, her Fifth Amendment privilege against self-incrimination was not violated because there is nothing in the Fifth Amendment that guarantees an accused the right to the presence of counsel during custodial interrogation. Therefore, with the absence of a Fifth Amendment violation, the Respondent's subsequent confession cannot be tainted and is admissible if the circumstances surrounding it indicate that it was voluntarily made. Since the Respondent requested to speak with Detective Wood of her own free will and initiated

the conversation with him during which she confessed to the murder and since she gave the confession after being repeatedly advised of her *Miranda* Rights, Petitioner feels that the surrounding circumstances demonstrate that the confession was voluntarily given.

In addition to these similarities, there are a number of other factors in the case at issue that indicate that the Respondent's confession was more likely to have been volitional than the confession that was ruled admissible in *Elsted*. For example, in *Elsted*, the accused's admissible confession was given a short time after he had given the same confession. At the time that he made the second confession he was not informed that his prior confession could not have been used against him and he was under the belief that the cat had already been let out of the bag and as far as he was concerned his fate had been sealed. In the case at issue, the Respondent was not under the belief that her fate had already been sealed. During her earlier conversation with law enforcement officers she claimed the shooting was an accident. Therefore, when she spoke with Detective Wood at 2:00 a.m. she was under no compulsion to repeat a confession that had already been given to the police. Further, in the case at issue and unlike the circumstances in *Elsted*, the Respondent, herself, initiated the conversation with Detective Wood during which she subsequently confessed to the murder of her husband.

CONCLUSION

In conclusion this Court has before it a case involving a federal question of great public interest that was incorrectly decided by the Court of Appeals of the Third Appellate District of Ohio. The Court of Appeals ruled that when an accused has been denied his or her right to representation of counsel during custodial interrogation any subsequent statements are inadmissible. This ruling is in direct conflict with a line of cases, decided by this Court, that have established that an accused may waive his right to counsel during custodial interrogation and give a statement to law enforcement authorities. In addition, the fact that there has been a prior *Miranda* violation does not automatically preclude the admissiblity of a subsequent confession. *Miranda* is a non-constitutional prophylactic rule that was designed to set guidelines for law enforcement officers in the custodial interrogation of suspects. Since it provides rights that are not enumerated in the Fifth Amendment privilege against self-incrimination, a violation of *Miranda* does not necessarily constitute a constitutional violation. Without a constitutional violation any subsequent confession cannot be tainted. Thus, the Court of Appeals' conclusion that the denial of Respondent Theresa Booher's request for the presence of counsel during custodial interrogation tainted her subsequent confession is without merit.

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of the Third Appellate District of Ohio in this matter.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE THIRD APPELLATE DISTRICT OF OHIO ABUSED ITS DISCRETION WHEN IT DECIDED THAT A CONFESSION, GIVEN BY THE RESPONDENT TO LAW ENFORCEMENT OFFICERS, WAS INADMISSIBLE BECAUSE IT HAD BEEN TAINTED BY AN EARLIER PERIOD OF QUESTIONING DURING WHICH THE RESPONDENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION HAD BEEN VIOLATED WHEN THE TRIAL COURT HAD PREVIOUSLY DECIDED THAT THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE CONFESSION, INCLUDING THE FACT THAT THE RESPONDENT CONFESSED TO A PARTICULAR DETECTIVE AT HER REQUEST AND AFTER BEING REPEATEDLY ADVISED OF HER *MIRANDA* RIGHTS, HAD BEEN GIVEN FREELY AND VOLUNTARILY AND WAS NOT OBTAINED IN VIOLATION OF THE RESPONDENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

a) Law

For purposes of this discussion, if this Court should decide that, in addition to a *Miranda* violation, the Respondent's Fifth Amendment privilege against self-incrimination was also violated, the subsequent confession was nevertheless admissible because it was not tainted by the prior constitutional violation. This contention is based on this Court's firmly established rule that the making of a statement under conditions which preclude the admissibility of the statement does not disable the maker from making a usable statement after the conditions which contributed to the making of the first statement have been removed. *United States* v. *Bayer*, 331 U.S. 532, 67 S. Ct. 1394 (1947).

In determining whether or not the conditions, which con-

tributed to the making of the first statement have been removed, this Court and other Courts that have addressed this issue have looked to the totality of the circumstances surrounding the second confession or statement. *Haynes* v. *Washington*, 373 U.S. 503, 83 S. Ct. 1336 (1963). If the totality of the circumstances surrounding the second confession indicate that it was given voluntarily it will be admitted into evidence despite an earlier Fifth Amendment violation. Generally, the most significant factors considered are: whether the conditions which rendered the first statement inadmissible continued to persist when the subsequent confession was given, the existence of any intervening event between the tainted statement and the subsequent confession, whether *Miranda* Rights were given prior to the making of the subsequent confession, and the flagrancy of the police conduct that tainted the prior statement.

The first factor considered is whether the conditions, which rendered the first statement inadmissible, persisted during the making of the subsequent confession. *Lyons* v. *Oklahoma*, 322 U.S. 596, 64 S.Ct. 1208 (1944). Obviously, a time span of days is a strong indication that the conditions were different, but such a long span of time is not always necessary. Instead, all that is required is that the accused "at the time he (or she) confessed was in possession of mental freedom to confess or deny a suspected participation in a crime." 322 U.S. at 602, 64 S. Ct. at 1212. Factors such as absence of force, transfer of control over the accused and the attempt to keep the accused apprised of her Fifth Amendment privilege against self-incrimination are good indicators of mental freedom. 322 U.S. at 604, 64 S. Ct. at 1213.

In the case at issue, the presence of these same factors indicate that the Respondent possessed the requisite mental freedom to confess at the time of the confession. The Respondent had been placed in a jail cell at approximately 12:00 midnight and was left alone to reflect upon the events of the day and her present situation. (See Appendix Page 37a) She had been removed from the room in which the questioning

had taken place and had initiated the conversation with the Detective without any coaxing or prodding. Further she was not threatened or abused in any manner during this intervening period.

Also, any break in the stream of events is often relevant in determining the volitional nature of a subsequent confession that has followed a Fifth Amendment privilege against self-incrimination violation. *Clewis* v. *Texas*, 386 U.S. 707, 87 S. Ct. 1338 (1967), *Holleman* v. *Duckworth*, 700 F.2nd 391 (7th Cir. 1983). Usually it is not the length of time that determines the volitional nature of a subsequent confession but the events that occur during the break in time. In some cases, the initiation of a conversation with law enforcement authorities is sufficient to constitute a break in time between a Fifth Amendment privilege against self-incrimination violation and a subsequent confession. 700 F.2d 391.

In the case at issue, the Respondent was left alone and had the opportunity to collect her thoughts, to reflect, to ponder and to eat, sleep or smoke, if she so chose. Law enforcement personnel did not continue to question her nor did they intend to question her, at least not until she was represented by counsel. She could have waited to speak with her attorney without any further interruptions on the part of law enforcement personnel, but she chose not to wait. Instead, she summoned Detective Wood, who was no longer at the police station, of her own free will and with complete knowledge that she had the right to remain silent. When Detective Wood arrived she reinitiated the conversation after again being advised of her rights. These facts taken together clearly constitute a break in the stream of events during which time the coercive conditions which may have been present earlier in the evening were no longer present. Since coercion is normally associated with a deprivation or a threat of some sort, neither of which existed during this time period, it is obvious that this intervening period constituted a break in the stream of events.

In addition, the Court must also consider the existence of any intervening event of significance because quite often such an event will demonstrate that the subsequent confession was an act of free will. *Rawlings* v. *Kentucky*, 448 U.S. 98, 100 S.Ct. 2556 (1980), *Brown* v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975). In *Rawlings* v. *Kentucky*, 448 U.S. 98, 100 S.Ct. 2556 (1980), for example, the Court ruled that an accused's spontaneous confession to the ownership of drugs, after they had been discovered in the possession of someone else, constituted an intervening event. The Court noted that the confession was the product of an intervening event and was not the product of the illegal detention. 448 U.S. at 108, 100 S.Ct. at 2563.

In the case at issue a similar intervening event of significance occurred which illustrates the volitional nature of the Respondent's confession. This intervening event was the Respondent's reinitiation of the conversation with Detective Wood. The confession which followed the reinitiation of this conversation was volitional and was not the result of the alleged prior misconduct because it would not have been given if it had not been for the occurrence of this intervening event. Prior to the reinitiation of this conversation with Detective Wood the Respondent had been left alone. All questioning had ceased for approximately two hours and the Respondent was to have been left alone in her cell. Therefore, just as the confession in *Rawlings* would not have occurred but for the intervening event, this confession also would not have been given to the authorities if it had not been for the existence of this intervening event.

Also, the receipt of one's *Miranda* Rights prior to the making of a confession is very probative of the voluntary nature of a confession. Although the giving of one's *Miranda* Rights should not be looked upon as a cure-all for prior police misconduct, the fact that these rights were given should be considered along with each of the other factors previously mentioned. 422 U.S. at 603, 95 S.Ct. at 2261. This is especially true when these warnings were given "only moments

before" the accused has made the incriminating statements. 448 U.S. 107, 100 S.Ct. 2562, 2563. In such a situation the proximity in time between the confession and the warnings makes it more likely that the statements were voluntarily made. In *Rawlings*, for example, the Defendant received his *Miranda* warnings immediately before he confessed to the crime for which he was later convicted. 448 U.S. 107, 100 S.Ct. 2562, 2563. The Court noted that despite the prior police misconduct the issuance of the *Miranda* warnings immediately before the confession was an important factor which tended to demonstrate the voluntary nature of the incriminating statements. *Id.*

In the case at issue, the fact that the Respondent was given *Miranda* warnings immediately prior to her confession, is a very important factor in determining the volitional nature of the confession. This is especially true after a law enforcement officer has painstakingly gone through each and every right with the accused and has elicited numerous responses to a number of questions each designed to make it perfectly clear that the accused was waiving her privilege against self-incrimination. Each of the Respondent's responses were clear and concise and demonstrated her understanding of her rights and suggests that she was not under compulsion at the time of the confession. And how can the Appellate Court totally ignore the Respondent's own sworn testimony given weeks later wherein she herself states (while represented by counsel) she did not feel compelled, and voluntarily chose to waive her rights? (See Appendix Page 38a)

Finally, the flagrancy of the alleged police misconduct must also be considered as an important factor in determining the voluntariness of a confession. 422 U.S. at 604, 95 S.Ct. at 2262. Flagrant conduct has been defined as purposeful conduct on the part of law enforcement officers "calculated to cause surprise, fright, and confusion." 422 U.S. at 604, 95 S.Ct. at 2262. Some of the most common examples of flagrant misconduct include threats, promises, lengthy periods of questioning wherein the accused individual is deprived rest and nourishment, and custodial interrogation, which was not

preceded by a knowing and intelligent waiver of one's privilege against self-incrimination. In order to demonstrate that a confession was not obtained as a result of flagrant misconduct, the State has the burden of convincing the Court that the questioning of the accused individual was not conducted to cause surprise, fright and confusion. Generally, this can be accomplished by showing the absence of those methods commonly used to bring about these states of mind.

In the case at issue Respondent's confession was not the product of a surprised, frightened, and confused state of mind. There is nothing in the record to suggest that she was threatened in any way. The testimony from those who questioned her support this contention. Also, there is nothing in the record to support the contention that the Respondent was deprived rest, food, or drink during the period of questioning. She was given an opportunity to rest at approximately 6:00 p.m. after the Sheriff had questioned her for a short period of time. She was permitted to drink water and coffee and to smoke cigarettes throughout the questioning process. These factors taken together demonstrate that the police conduct during this period of questioning was far from flagrant. (See Appendix Page 37a)

Finally, the Appellate Court incorrectly decided that Detective Wood's conversation with the Respondent contained an underlying promise of leniency if she confessed to the crime. In response to this argument, Petitioner points out that no promises of help were directly or impliedly offered to the Respondent. An implied promise is one which the accused is led to believe by the words or conduct of a law enforcement officer. This belief, however, must be reasonable and cannot be based upon pure conjecture. *U.S.* v. *Springer*, 460 F.2nd 1344 (7th Cir. 1972). In the case at issue, nothing was said to the Respondent which would have led her to reasonably believe that the law enforcement officers were going to help her. Although Detective Wood and the Sheriff did use the word help on a number of occasions during the questioning period, it was used in a counseling context as a means of encouraging the Respondent to ease her conscience.

CONCLUSION

In conclusion the circumstances surrounding the Respondent's confession that was given to Detective Wood between the hours of 2:00 a.m. and 4:00 a.m. on February 21, 1986, indicate that the confession was given freely and voluntarily in compliance with the Fifth Amendment privilege against self-incrimination clause of the United States Constitution. This constitutional issue was addressed by the Court of Appeals for the Third Appellate District of the State of Ohio and was decided in a way in conflict with applicable decisions of this court. The Court of Appeals for the Third Appellate District of Ohio laid heavy emphasis upon the interviewing law enforcement officer's failure to comply with the Respondent's request for counsel and the undertone of help that existed throughout the whole questioning process without carefully weighing the totality of the circumstances surrounding the subsequent confession. The Court of Appeals failed to take note of the fact that the Defendant requested to speak with Detective Wood without prompting from anyone except her own conscience. The Court of Appeals failed to note that this request was made after the Respondent had been left alone for a period of time and had had an opportunity to ponder the events of the preceding day. The Court of Appeals also failed to consider that upon Detective Wood's arrival at the police station the Respondent initiated the conversation during which she confessed to the murder. Finally, the Court of Appeals failed to note that before she was permitted to proceed in the conversation with Detective Wood the Respondent was repeatedly advised of her *Miranda* Rights and waived these rights. Each of these considerations comprised the totality of the circumstances surrounding the Respondent's confession and should have been considered before a determination was made regarding the nature of the confession. For this reason Petitioner submits that the Court of Appeals' decision is patently incorrect and should be summarily reversed by this Court.

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Appellate District of Ohio in this matter.

REASON FOR GRANTING THE WRIT

THE EXCLUSIONARY RULE RELATING TO STATEMENTS SHOULD BE ABOLISHED AS IT CAUSES SUPPRESSION OF STATEMENTS BY FINDING THEM TO BE NON-CREDIBLE, AND CREDIBILITY AS IT RELATES TO GUILT OR INNOCENCE SHOULD BE WITHIN THE PROVINCE OF TWELVE TRIERS OF FACT, THE JURY.

a) Law

The United States Supreme Court outlined the justification for the exclusionary rule in *United States* v. *Leon*, 468 U.S. 1250, 104 S.Ct. 3405, (1984). It is contended that the exclusionary rule as it applies to confessions and statements should be terminated as it usurps the province of the trier of fact, the jury, as exclusion is virtually a pre-trial judicial determination of credibility. When a jury ignores evidence, it has in effect "excluded" that evidence. It has determined that evidence to be unreliable. The Third District Court of Appeals in its decision paraphrased the Supreme Court by stating in its Opinion at Page 11:

> Another way of stating this is that an involuntary confession has no probative weight since the will of the confessor has been overridden and it is really another voice speaking. (See Appendix Page 10a)

To suppress a confession and allow a known police killer to go free does not comport with the intent of the Rule. Let the trier of fact decide if the statement is voluntary and credible, therefore admissible. The trial system is replete with safeguards; we have voir dire, where defense counsel can inquire directly of the jurors. (If counsel can question prospective jurors about their feelings of a Defendant's not testifying, or about his prior record, he/she can also inquire of juror attitudes as to coercion.) We have direct and cross-examinations to elicit truth and impeach testimony we have opening and closing arguments. And we have an impaneled jury to listen to the Judge's charge and apply the law as well as common sense.

CONCLUSION

Exclusion of confessions as it relates to credibility, which flows from voluntariness, should fall within the purview of the jury in its decision making process. Voluntariness and reliability should be an issue of fact rather than an issue of law. Rote exclusion of a statement prior to trial takes away the State's right to a fair trial by the people and allows substitution of a Judge for the ultimate trier of fact. Better twelve (12) triers of fact that one (1).

Respectfully submitted,

PETER R. SEIBEL
Prosecuting Attorney
Defiance County, Ohio

APPENDIX A

Court of Appeals
Third Appellate District
Defiance County, Ohio

CASE NO. 4-86-8

STATE OF OHIO,
Plaintiff-Appellee,

v.

TERESA BOOHER,
Defendant-Appellant.

OPINION

(Filed September 15, 1988)

CHARACTER OF PROCEEDINGS: Criminal appeal from Common Pleas Court
JUDGMENT: Judgment reversed.
DATE OF JUDGMENT ENTRY: September 15, 1988

ATTORNEYS:

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For Appellant.

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For Appellee.

PER CURIAM. This is an appeal from a judgment of conviction and sentence of the defendant-appellant by the Com-

mon Pleas Court of Defiance County for the offense of aggravated murder with a firearm specification.

On February 20, 1986 about 11:30 A.M. the City Police Department of Defiance, Ohio, received an emergency call requesting assistance at 1221 Shawnee Drive in that city. The call was made by the defendant, Teresa Booher, who informed the police that her husband, Gary Booher, a patrolman on the Defiance police force, had been shot.

On arrival at this location, the residence of the Booher family, the officers responding to the call found Gary Booher lying on a bed dead from a gunshot wound to the head. By 12:30 P.M. that date the investigation had centered upon the defendant, and she was taken to the police station for interrogation and, at about 1:00 P.M., was given the Miranda warnings. This questioning continued at frequent intervals and for substantial duration until about midnight of that day.

Although some of her family called at the police station, she was not permitted to see or talk with them and was essentially isolated from all contact, other than with the interrogating policemen and police employees all of whom with one exception were fellow-employees of her husband. Parts of this interrogation which continued intermittently during the succeeding hours were taped and were available to the trial court as exhibits introduced in the suppression hearing.

Subsequently, sometime about 11:30 P.M. that night, the defendant indicated she wished an attorney but no attorney was immediately provided. Instead, as set forth in the brief of the state, (p.4):

> "* * * Subsequent to that request [which had been made to the Prosecuting Attorney] the Chief of Police and Detective G. W. Wood did continue to question the defendant to ascertain any additional information. Such questioning was done with the knowledge and understanding that that portion of the questioning was suppressable if any admissions were made; but the decision was made to ascertain the truth at the expense of legal technicalities. * * *."

This is further set forth in the testimony of Officer George William Wood (Tr.68, 69):

"* * *

Q And she had asked for an attorney to your knowledge?

A Yes, sir, she had.

Q Who did she ask that to?

A I believe it was the Prosecuting Attorney.

Q The Prosecutor? To your knowledge, was there any questioning after she asked for an attorney?

A Yes, sir, I believe there was.

Q By whom?

A Chief Shock, possibly the Prosecutor, myself.

Q I see. Was she advised of her rights after that?

A No sir, she was not.

Q And this is about what time?

A Between 11:30 and 12:00.

* * *."

Thereafter, or at about that time, the defendant was served with a warrant for arrest on a charge of aggravated murder, booked, and placed in a jail cell sometime between 11:30 P.M. and midnight. About 2 A.M., February 21, 1986, she asked the jailer if she could speak with Officer Wood. At about 2:15 A.M., again in the interrogation room, she asked Wood if she could ask him a couple of questions. Wood proceeded to go through the Miranda rights and insisted upon a written waiver of these rights from her (St. Ex.52) before he would talk to her.

Further statements in the nature of a confession were obtained over a period from 2:15 A.M. to 3:15 A.M. This entire statement was taped and the tape introduced as Joint Exhibit 2. A transcribed copy was prepared and became St.Ex.53.

[Some of these exhibit numbers are trial numbers, but the items appear to be identical to the exhibits at the suppression hearing].

The defendant, on February 25, 1986, was indicted and James S. Borland was appointed counsel. On April 8, 1986, counsel filed a motion for change of venue, a motion in limine and a motion to suppress all of defendant's statements of February 20th and 21st as being in violation of her rights under the Fourth and Fifth Amendments, and the Fourteenth Amendment to the U.S. Constitution, and "therefore not voluntarily given."

On April 28, 1986, the trial court continued the motion for change of venue for consideration at the time of voir dire and also continued the motion in limine.

On May 20, 1986, the trial court found the defendant-appellant able to stand trial and, on the same day, in a lengthy opinion, ordered suppressed all the statements of the defendant made prior to the incarceration at about midnight of February 20, 1986, stating that these "were not the product of an essentially free and unconstrained choice by the defendant." The statements made between 2:15 A.M. and 3:15 A.M. on February 21, 1986 were not suppressed.

Subsequently, the motion for change of venue was overruled and the case proceeded to trial, terminating in the conviction and sentence heretofore noted.

A motion for new trial was filed and subsequently overruled without hearing.

The defendant then appealed asserting three assignments of error. At this time, appointed counsel for the appeal was Jeffrey A. Strausbaugh, who had previously been appointed with James Borland as trial co-counsel. Subsequently, Strausbaugh moved to withdraw because of irreconcilable differences with the appellant, and James R. Hodge was appointed counsel for the appeal. Because of this change, there are in the file two sets of briefs and two sets of assignments of error. The second set, filed by Hodge, are identical with the first set filed by Strausbaugh, except that a fourth assignment (number I) was included. Because of this substantial identity,

we quote only the second set filed by Hodge. These are as follows:

"I. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL,

"A. FAILED TO REQUEST A CHANGE OF PROSECUTING ATTORNEY BASED ON A CONFLICT OF INTEREST;

"B. FAILED TO DECLINE REPRESENTING DEFENDANT, WHERE THE SAME LAW FIRM REPRESENTED THE PROSECUTOR'S WIFE;

"C. FAILED TO PROVIDE THE DEFENDANT WITH AN IMPARTIAL JURY WHERE DEFENSE COUNSEL ESTABLISHED THAT JURORS DEVELOPED BIASED OPINIONS AGAINST THE DEFENDANT BY READING NEWSPAPER ARTICLES AND BY PERSONAL KNOWLEDGE OF THE DEFENDANT AND/OR HER FAMILY.

"II. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION TO SUPPRESS THE STATEMENTS AND ALLEGED CONFESSION GIVEN TO VARIOUS LAW ENFORCEMENT OFFICERS ON FEBRUARY 21, 1986, RELATED TO THE DEATH OF HER HUSBAND.

"III. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION FOR CHANGE OF VENUE.

"IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL."

The court considers the second assignment of error to be of primary importance and, for this reason, it will be first discussed.

II. The trial court erred in failing to grant defendant-appellant's motion to suppress the statement and alleged confession given to various law enforcement officers on February 21, 1986, related to the death of her husband.

First, it becomes necessary to determine what factual data is before this court for the consideraton of the assignment of error. Due to some apparent oversight, there was originally no transcript of the evidentiary hearing on the motion to suppress included in the record herein filed, the original praecipe referring solely to the trial transcript. Subsequently, to rectify this omission, the parties stipulated that "excerpts from testimony" adduced at the suppression hearing were by error or accident omitted from the record, and stipulated to include the testimony [at the hearing to suppress] of Sheriff David J. Westrick, of George William Woods, and of Teresa Lynn Booher, the defendant. This court on October 30, 1986, ordered such supplementation. Included with the testimony of Woods were certain tapes covering interrogation of the defendant together with documentary transcripts of these tapes. Unfortunately, there is nothing to indicate the full scope of the hearing. We cannot ascertain from the three separate transcripts whether these three witnesses alone testified, or whether there were others, and, if so, what they said.

However, this unsatisfactory condition of the record is remedied somewhat by the fact that the trial court issued a reasonably comprehensive opinion which complied with the requirements of Crim. R.12(E). The trial court further stated its conclusions of law which are well stated, which thoroughly analyzed the issues, and which were of much assistance to this court. We confine therefore the factual environment surrounding the issue here presented to the affidavits of the police witnesses, the various tapes, and the conclusions of fact as stated by the trial court.

The facts pertaining to the interrogation of the appellant as stated by the trial court are as follows:

> "The evidence reflects that the defendant's husband, a police officer, employed by the Defiance City Police Department died of a gunshot wound to the head, inflicted in the morning hours of February 20, 1986, while he was in bed at his home. Thereafter, sometime prior to 1:00 p.m., the defendant was taken into custody by a joint team of law enforcement officers consisting of the Defiance County Sheriff's Department, the Defiance City Police Department and at least one member of the Van Wert County Sheriff's Department for questioning. The defendant was given her Miranda warnings initially at 1:07 p.m. and thereafter questioned briefly by Detective George Wood of the Defiance City Police Department. Serious interrogation of the defendant did not apparently begin until approximately 3:00 p.m. upon the arrival of Detective Ralph Eversole of the Van Wert County Sheriff's Department, at which time Det. Eversole and Defiance County Sheriff Dave Westrick began the interrogation of the defendant. Det. Eversole terminated his interrogation at approximately 5:00 p.m., following which Sheriff Westrick continued interrogating the defendant for approximately one more hour. The interrogation ceased from approximately 6:00 p.m. until about 8:00 p.m., at which time at least Sheriff Westrick, his secretary, Pamela Stephens, and Det. Wood interrogated her until, according to Sheriff Westrick's testimony, about 10:00 p.m.
>
> "The evidence is not clear as to the exact chain of events between 10:00 p.m. and 12:00 midnight, but during this period of time the defendant was interrogated by at least the following individuals: Prosecutor Peter Seibel, Defiance City Police Chief Shock and Major Jerry Johnson of the Defiance County Sheriff's Department. During this time frame, the defendant requested to talk to an attorney and she was served with an arrest

warrant for aggravated murder. The interrogations by Prosecutor Seibel and Chief Shock took place after her request for counsel.

"Prosecutor Seibel's conversation with the defendant after her request for counsel was solely for the purpose of informing her that although he had represented her and her husband on matters prior to this time that he could not act as her attorney in the present matter and that other counsel would be furnished to her if she so desired. There is no indication in the record as to what Chief Shock discussed with the defendant after her request for counsel.

"At approximately 12:00 midnight the defendant was processed and placed in a cell in the Defiance City Jail, and all further interrogation ceased. Prior to midnight the defendant was held in a small interrogation room in the Detective Bureau at all times and was always accompanied by other female employees of the Defiance Police Department while not being interrogated. During this period of time, the defendant's parents, brother and several friends were waiting to see defendant, however neither was the fact communicated to her nor was she afforded any opportunity to visit with anyone other than agents of the state. Also during this time the defendant was always provided with water, coffee, cigarettes and the opportunity to go to the bathroom upon request, however she was not furnished any meals. The record does not indicate that she ever asked for meals however, and it is reasonable to presume that food was not being intentionally withheld from her, given their accomodation of her other request.

"Typically, only those critical portions of the interrogation, where the defendant began to unravel the story of her participation in the shooting have been preserved on tape or by transcript. Even in these brief exerpts, however, there exists an undertone of indications or promises that there would be 'help' available for the defendant when she finally told the 'true' story.

"At approximately 2:00 a.m., February 21, 1986, the defendant told the jail matron during a routine jail check that she wished to talk to Det. Wood. Wood then returned to the Police Department and at approximately 2:15 a.m. met with her back in the interrogation room. At this time Wood again went over the defendant's Miranda rights, emphasizing them very appropriately due to her previous request for counsel, which she waived in writing.

"Wood then proceeded into a full scale interrogation which resulted in the defendant's full confession to the story as Det. Wood believed it to be. This interrogation lasted until 3:15 a.m. and an 'aftermath statement' was taken concerning extraneous matters commencing at 3:20 a.m. and lasting approximately ten more minutes."

The defendant contends that the police conduct violated her various constitutional rights under the federal constitution, i.e., her right against self incrimination under the Fifth Amendment, her right to counsel under the Sixth Amendment and her rights under the Fourteenth Amendment against the use against her of admission or confession obtained by coercion or improper inducement.

The scope of this issue, however, may be narrowed considerably. There appears to be no question as to the oral and written waiver of rights made about 2:15 A.M. on the 21st of February prior to appellant giving her statement. Ex. 53, p.1-3,35,36. Based upon the evidence presented at the hearing the trial court determined these waivers would, if effective, eliminate any question as to the denial of rights. This, in fact, is what was the concern of the trial court and that court determined that a large portion, (that is, the first portion of the interrogation covering some thirteen hours) was not admissible because it was obtained by coercion and was not given voluntarily by the defendant. This question as to whether or not the statements were given voluntarily and whether or not purported waivers were given, voluntarily

arises as to each of the separate rights now asserted by the appellant.

In *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, the court states at 39-40:

> "In demanding that a confession be voluntary, *Miranda* was requiring nothing new. The Supreme Court of the United States had established such to be the law in *Bram* v. *United States* (1897), 168 U.S. 532, 542, as follows:
>
> "'"* * * [A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by exertion of any improper influence * * *."'
>
> "Although the language of *Bram* is categorical, it is doubtful whether the courts today would interpret the *Miranda* requirements so that any promise, 'however slight' which induces a confession would render the confession involuntary and hence inadmissible. Thus in *United States* v. *Ferrara* (C.A. 2, 1967), 377 F. 16, 17, certiorari denied, 389 U.S. 908, the Court of Appeals stated:
>
> "'"* * * The *Bram* opinion cites with approval the statement in an English textbook that a confession is not voluntary if "obtained by any direct or implied promises, however, slight." That language has never been applied with the wooden literalness urged upon us by appellant. The Supreme Court has consistently made clear that the test of voluntariness is whether an examination of all the circumstances disclosed that the conduct of "law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined * * *."'"

Another way of stating this is that an involuntary confession has no probative weight since the will of the confessor has been overridden and it is really another's voice speaking.

The test for voluntary action was also set forth in *Edwards*, *supra*.

> "2. In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."

In *Haynes* v. *Washington* (1963), 373 U.S. 503, the Supreme Court stated at 514:

> "The uncontroverted portions of the record thus disclose that the petitioner's written confession was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities. We have only recently held again that a confession obtained by police through the use of threats is violative of due process and that 'the question in each case is whether the defendant's will was overborne at the time he confessed,' *Lynumn* v. *Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 920, 9 L.Ed.2d 922. 'In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.' *Wilson* v. *United States*, 162 U.S. 613, 623, 16 S.Ct. 895, 40 L.Ed. 1090. See also *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

Thus all the circumstances surrounding and operative during the taking of a statement are material and must be examined not only individually, but in their totality.

Here the trial court examined the facts and concluded:

"The factors that the court in this case must reconcile are that the interrogation was lengthy, and conducted by teams of interrogators operating in relays. The defendant was being interrogated by friends and co-workers of her husband, the victim of what the perceived [sic] to be a brutal murder. The presence of the prosecuting attorney as an agent of the state, who had also previously represented her privately, and who further felt compelled, after she requested to talk to an attorney, to point out to her that he was not able to represent her, must also be considered. Also, there is the consistent undertone throughout the entire recorded portions of the interrogations of some vague promise of 'help' from the police. Furthermore, the defendant was held incommunicado from waiting family and friends, even though there were substantial breaks in the interrogations lasting up to two hours at a time. And finally, the defendant was interrogated at least by Chief Shock after she requested counsel.

"None of these factors would, by themselves, require the conclusion that the defendant's will was overborne and the statements were not made voluntarily. However, the *combination* of so many of them forces the Court to find that all of the statements made prior to the defendant's incarceration, shortly before midnight of February 20, 1986 were not the product of an essentially free and unconstrained choice by the defendant and must be therefore suppressed."

Thus any statement given from about 1:00 P.M. February 20, 1986 to midnight of that day were excluded by the trial court. We agree with this determination and conclusion. We are therefore concerned only with the court's failure to suppress the "confession" set forth on the tape (Joint Ex.2), and the transcript thereof (State's Ex.53). This not only narrows the scope of inquiry, but also the issue for consideration narrows. There has been a determination that as to the first part of the interrogation the will of the defendant was overborne.

The confession here involved was made only 2 hours later. Is this interval sufficient to remove or nullify the overbearance and render this subsequent statement a free and voluntary act, and the waiver of rights a free and voluntary waiver? This is the ultimate question placed by the factual situation before the trial court.

There is a preliminary procedural problem. May this court, reviewing the conclusions of the trial court, redetermine the issue, or is this simply a matter of fact upon which the finding of the trial court is conclusive. In *State* v. *Arrington* (1984), 14 Ohio App. 3d 111, it is said at 112:

> "Normally, in order to determine the voluntariness issue when there is conflicting evidence, an independent review of the record is warranted. See *Mincy* v. *Arizona* (1978), 437 U.S. 385, 398; cf. *Beckwith* v. *United States* (1976), 425 U.S. 341, 348. Here, however, there exists a complete transcript of appellee's interrogation on June 10, which was proffered at the suppression hearing as state's Exhibit 1. * * *."

It would appear that the ultimate issue of voluntariness constitutes an issue of law and that this court not only can, but should, review the factual circumstances to determine, on the basis of the record before us, and the reasons advanced by the trial court, that basic issue.

In 29 American Jurisprudence 2d (1967), 588-589, Evidence, Section 537, it is stated:

> "If one confession is obtained by such methods as to make it involuntary, all subsequent confessions made while the accused is under the operation of the same influences are also involuntary. It is immaterial, in this connection, what length of time may have elapsed between the two confessions, if there has been no change in the circumstances or situation of the prisoner. Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even

> though made to a different person than the one to whom the first was made. However, a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influences if it is shown that these influences are not operating when the later confession is made. In other words, the presumption that a subsequent confession of the same crime flows from the same improper influences which induced a prior confession is not a conclusive one and may be overcome by proof that the influences present at the prior confession did not operate on the subsequent confession. * * *."

This issue was the basic issue presented in the case of *State* v. *Arrington*, *supra*. It was also the ultimate concern of the trial court.

> "The next question involves whether the abandonment of the interrogation before midnight, the incarceration of the defendant and her subsequent request to reinstitute dialog with Det. Wood constitutes a 'break in the stream of events' as discussed in CLEWIS v. TEXAS 386 U.S. 707, sufficient to shed the taint of the prior unconstitutional action by the agents of the state."

The trial court concludes after the consideration of several factors derived from *Brown* v. *Illinois* (1975), 422 U.S. 590, 95 S. Ct. 2254, and *Rawlings* v. *Kentucky* (1980), 445 U.S. 97; 100 S.C. 2556, as follows:

> "Given this set of facts, the Court finds that the confession made by the defendant between 2:15 a.m. and 4:00 a.m. on February 21, 1986, was both voluntary and sufficiently removed from the prior tainted statements to be admissible."

We disagree with this conclusion. Both *Brown*, *supra*, and *Rawlings*, *supra*, were concerned with the effect of an illegal arrest upon a subsequent confession. Here we are concerned with a far more aggravated situation. Here the trial court

itself has determined that the conduct of the police over a period of some thirteen hours was such as to be coercive in nature and sufficient to warrant the exclusion of all statements made during that period. In *Oregon* v. *Elsted* (1985), 470 U.S. 298, 310, where the court was further concerned with the time sequence problem, a simple failure to give Miranda warnings and a subsequent incriminating statement, the court says:

> "* * * When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession. See *Westover* v. *United States*, decided together with *Miranda* v. *Arizona*, 384 U.S., at 494, 86 S.Ct., at 1638; *Clewis* v. *Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967). * * *."

Further, at page 312:

> "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question, as in this case. * * *"

The sum and substance of all these cases as to time sequence appears to be that the court must consider the totality of circumstances bearing upon the coercive conduct and its temporal continuation in effecting or overbearing the will of the witness. See *State* v. *Gooden* (1983), 16 Ohio App. 3d 162. Consideration of the factors set forth in *State* v. *Edwards*, *supra*, is also pertinent.

We would assert that the trial court overlooked certain circumstances and arrived at an erroneous conclusion on the issue as to the dissipation of the taint created by the initial coercive conduct. The following paragraphs consider these

factors which, in part, overlap the criteria considered by the trial court.

1. The continuation of the same environmental factors. It must be noted that the questioning during the day took place in a small room in the police station; the continuance of interrogation took place in the same or a similar room. One of the major interrogators during a substantial portion of the day was Detective George Wood (Tr. 19). The sole interrogator after midnight was the same person. During the day from 1:00 (and possibly some time before) the appellant ate no food. After midnight she still had had no food. The questioning during the day, while not continuous, was without any significant rest periods. After midnight the interrogation was continuous for about one hour, after an hiatus of about two hours.

2. The promises of help. Noted by the trial court, were these assurances of "help" by the interrogators. This did not consist of a single instance. In the tapes of the questioning prior to midnight appear numerous examples:

> a) "I know you want to tell us about it, the *only way we're gonna be able to help you Terri is if you cooperate entirely.*"
>
> b) "In order for us to and I'm *we we gotta answer to the prosecutor ok, in order for us to help you you're gonna have to be flat out honest with us*, I mean flat out don't put any thing back because if your flat out honest and I'm goinna be flat out honest with you. In order to get any help from us Terri, we're gonna need some help with this okay."
>
> c) "GW: If you'd have been if if you were really ah it was an accident, you'd call wouldn't ya? Now wait, now Terri, don't get upset just tryin to give you get you to where to understand me, *and for me to help you Terri* we've gotta have the whole truth. I don't want to go through another five hours or four hours or two hours like we've been through I don't think it's necessary at this point. I think you your talkin around and you're gonna

tell us everthing that's involved in this, it's gonna be brought up. Anyhow, even, though and on your way or noth another when we involve other people in it whether you want to take it all yourself, this is the way it's gonna be. *Alright, because I'm not gonna have the final say so in what happens the Prosecutor is and if you co-operate entirely with us then I can get with the prosecutor and keep this simple as possible*, if there's any flaws in this which I'm sure he sees em now, he's thinkin just like everybody else is then he's gonna say bullcrap we're goin the other way alright? *If you co-operate with us now tell us the truth, I'm sure he's gonna go along with us alright*?"

"GW: And then it's gonna be you that's gonna be hurt and then I'm gonna be hurt, cause then I've got to live with it the rest of my life, but I've been stayin here long enough to talk to you to get the truth out of you *so I can help ya* do you standstand that? * * *"

"GW: No come on will ya Terri, Terri, you've went this far got the rest of the way give me a break, *I want to help you Terri come on*."

"PS: Terri, you know these guys have been real patient with you, they would have they wouldn't have been this patient with anybody else they would have quit a long time ago. But they know and I know that you're not levelin with us, you're not there's something you're not tellin us, we're gonna find out and we're gonna have to go on what you did tell us, and what Bill and Dave is tryin to the jury's gonna know *do you want us to help you*?

"TB: Yes.

"PS: *Really want us to help you*?

"TB: Yes.

"PS: Okay, then could you just tell us exactly what happened * * *?"

"PS: And then what, Terri all the guys talked to you tonight, Dave's the one that wants to help you the most, youknow that don'tya? And he told you that okay,"

"GW: * * * I don't think that you believe that we're gonna help.

"TB: Yes, I do believe you're gonna help."

"PS: * * * So you might as well tell us what really happened and then we can go from there, that's *the only way we're gonna be able to help ya.*"

"GW: Terri, come on Terri, I *got I want you to help, alright, do you want my help*?

"TB: Yes."

"GW: * * * we *talked to ya how are we gonna help ya Terri if you're not gonna help you self, and you're not gonna do it are ya*?"

"GW: * * * You're gonna have to tell the truth Terri it's got to come out. Come on Terri help us so we can help you, Terri help us so we can help you tell me the truth, *and I'll help ya, I gotta have something to help ya with, come on, okay,* Terri Terri, it's just you and me now, alright, now tell me the truth, tell me the truth, and I'll help ya, Terri * * *."

Parenthetically we note that these are excerpts not continuous statements, and that the misspellings and other grammatical problems exist in the transcript before the court. Underlining for emphasis has been added.

These clearly show that the officers indicated "help" was in the offing if the defendant would just say what they wanted her to say, rejecting what she had said before. And "help" was in some places related to recommendation to be made to the prosecutor; in short, some implied benefit in consideration. In the case of *State* v. *Arrington, supra,* the following quotation is relevant:

"As persuasively stated in *People* v. *Flores* (1983), 144 Cal. App. 3d 459, 192 Cal. Rptr. 772, 776-777:

"'"The line to be drawn between permissible police conduct and conduct deemed to induce or tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon *the nature of the benefit to be derived by a defendant if he speaks the truth*, as represented by the police. * * *

"'"When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, *the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.* The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear." (Emphasis added.)' (Quoting *People* v. *Hill* [1967], 66 Cal. 2d 536, 549, 58 Cal. Rptr. 340, 426 P.2d 908."

These references to "help", and the trial court referred to them as a consistent "undertone", did not suddenly disappear at the coming of midnight, but remained as essential elements effecting the interrogation after 1:00 A.M. The first thing the appellant said then was that she just wanted to ask questions. The first question was "You can still help me?" (Ex.53, P.1). Shortly thereafter [page 4] Detective Wood says:

"* * * I don't think you can honestly say, looking me in the face, that I've never been, deceived you in any way and I help you the last time, is that not correct? Yes or No.

"* * *

"I told you I'd help you this time but I gotta know the truth * * *"

Thus, the consistent "undertone" is continued into the period after 1:00 A.M. and becomes part of the circumstances then existing, and part of the totality of circumstances affecting the non-existence of a break in the stream of events. *Clewis* v. *Texas*, 386 U.S. 707.

3. There can be no question that the Miranda warnings were again given. Here, however, the fact they were given and explicitly waived by the appellant is not controlling. Waivers, as well as confessions must be voluntary acts, and whether the waivers were voluntary at this stage of the proceeding, or whether they, too, were the product of the preceeding and co-existent coercive events, or promises of help as inducements is a part of the question. The giving of the warnings and the written waiver is only one factor to be considered, going more to the question as to whether the waiver was done knowingly than the question as to whether it was done voluntarily.

The court in *Brown* v. *Illinois*, *supra*, states that Miranda warnings are an important factor (and here the court is not concerned with prior coercive conduct, but with the much lesser situation of a prior illegal arrest). It continues at 603-604:

> "But they are not the only factor to be considered. The temporal proximity to the arrest and the confession, the presence of intervening circumstances, * * * and particularly, the purpose and flagrancy of the official misconduct are all relevant. * * * The voluntariness of the statement is a threshold requirement and the burden of showing admissibility rests, of course, on the prosecution."

4. The trial court next considered as a factor the temporal proximity of the coercive factor and the confession or waiver of the right to remain silent. Approximately two hours intervened and it may be clearly inferred from the facts presented that the appellant did not sleep during this period. (Tr. 695). The trial court says she "had considerable opportunity to reflect upon the events of the day and her present

situation." While this may be true, nevertheless, it also is a very short time for the effects of lengthy prior interrogation "conducted by teams of interrogators operating in relays" to be dissipated. The repeated assertions by them that she was not telling either the truth or the whole truth, but that help was in the offing if she did tell them a story they could believe was still operative. The impact of offers of help as inducements are not necessarily or even probably erased by the passage of time.

5. The next factor noted above and considered by the trial court is that of flagrancy of police misconduct. It is found to be not "particularly flagrant nor purposeful but just a combination of circumstances that on balance indicated that the statements were not voluntarily made." The trial court was here considering the statements made prior to midnight. We think this unduly minimizes the impact of this prior conduct on the subsequent statements. We here particularly refer to the manner in which the police dealt with the appellant's right to counsel. At some time about 11:30 P.M. she asserted her right to counsel and requested a lawyer.

In *Edwards* v. *Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, the court states at 485:

> "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' 384 U.S. at 474, 86 S.Ct., at 1627. Our later cases have not abandoned that view. In *Michigan* v. *Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U.S., at 104, n. 10, 96 S.Ct., at 329-330 (White, J., concurring). In *Fare* v. *Michael C.*, *supra*, 442 U.S., at 719, 99 S.Ct., at 2569, the Court referred to *Miranda's* 'rigid rule that an accused's request

> for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.' And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the 'undisputed right' under *Miranda* to remain silent and to be free of interrogation 'until he had consulted with a lawyer.' *Rhode Island* v. *Innis*, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980). We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."

See also *Oregon* v. *Bradshaw* (1983), 462 U.S. 1039; 103 S.Ct. 2830, and the recent case of *Arizona* v. *Roberson* (1988), 108 S.Ct. 2093.

Here we are not concerned with the request of appellant made through the jailor to speak with Detective Woods but are concerned with what occurred when prior to midnight she initially requested counsel. As we have noted, the requirement of *Miranda* that "all interrogation cease until an attorney is present" was *not* observed. We have already quoted the statement of the prosecutor to the effect that at that time, there being no waiver or anything that could be construed as a waiver, the questioning continued by the Chief of Police Shock, by Wood and possibly by the prosecutor. This was done deliberately and, apparently, as a matter of policy.

We consider this a flagrant disregard of appellant's rights. Moreover, the effect of this action was such as to effectively render for the appellant the frequent statements (estimated to be 11 times) of *Miranda* rights meaningless. Having been told she had a right to remain silent and to have an attorney, when that right was asserted it was ignored by her interrogators, no attorney was provided, but interrogation continued. Such events necessarily would place in the mind of the appellant serious doubts as to whether assistance of counsel had any meaning, or would, in fact, be forthcoming.

She demonstrates the carry-over of this doubt by her subsequent request to speak with Wood "to ask him a couple of questions," the first of which was "can you still help me?" (By reasonable inference the use of the word "still" was probably a reference to the intervening service of the arrest warrant). The constant reiteration by the interrogators of "help" near at hand, and the effective nullification of her request for counsel to halt the continuting interrogation combine to constitute an over-reaching by the police and on their demonstrated carryover into the subsequent period.

In addition to these factors, there remain the factors cited for consideration in *State* v. *Edwards*, *supra*, most of which have already been touched upon.

As to age, the appellant was mature, apparently of sound mentality, and had, so far as the record reveals, one prior brush with the law where prosecution did not result. This is apparently the incident to which Woods refers when he said he had helped her "the last time". We have covered the length, intensity, and frequency of interrogation which was long, intense, and frequent over the thirteen-hour period. There is no apparent overt physical deprivation or mistreatment but, perhaps inadvertently, the defendant, who did not apparently request food, was offered none. She was further kept from being aware her family was waiting to see her. We have further covered the last *Edwards* facet of the existence of threat or inducement. There was no overt threat except the threat inherent in the situation. However, there was strongly implied a promise of help, i.e., aid and by reference to the prosecutor of some avenue to leniency if she would just abandon the previous statements and tell some other version.

We have considered all of these factors, not only individually, but also as parts of the totality of circumstances, in their mutual interrelations, and conclude that the state failed to establish, by a preponderance of the evidence, that the confessions taken after midnight on February 20, 1986, were voluntary. *Lego* v. *Toomey* (1972), 404 U.S. 477, 92 S.Ct. 619. The illegalities surrounding the taking of the statements prior to midnight were not sufficiently purged to

eliminate the taint created prior to that date by police conduct. See also *State* v. *Arrington*, *supra*.

We therefore determine that the assignment of error is well taken.

III. The third assignment of error reads as follows:

The trial court erred in failing to grant defendant-appellant's motion for change of venue.

The granting of a motion for a change of venue rests within the sound discretion of the trial court. *State* v. *Stemen* (1951), 90 Ohio App. 309, 310. Absent an abuse of discretion, a reviewing court should not disturb the ruling of the trial court. In *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, the court stated at 250:

> "As this court observed in *State* v. *Fairbanks* (1972), 32 Ohio St. 2d 34, 37 [61 O.O. 2d 241]:
>
> "A change of venue rests largely in the discretion of the trial court, and there are numerous cases holding that appellate courts should not disturb the trial court's ruling on a motion for a change of venue in a criminal case unless it is clearly shown that the trial court had abused its discretion. * * * [Citation omitted.]"

It is not an abuse of discretion for the trial court to take a motion for a change of venue under advisement until an examination of the prospective jurors is conducted. In *Richards* v. *State* (1932), 43 Ohio App. 212, the court stated at 215:

> "Where it is contended that an impartial jury cannot be impaneled, it seems that the court may, in such a case, postpone or overrule the motion until it is ascertained by the examination of jurors whether a fair and impartial jury can be impaneled. In such a case the motion is overruled without prejudice to the defendant; he having the right to file another motion for a change of venue while the impaneling of the jury is in progress. It has been said that it is not an abuse of discretion for the court to do this, even though the affidavits for the defendant make a showing that would justify a change of venue."

The defendant-appellant asserts that the trial court should have granted the motion for a change of venue due to pretrial publicity that would prevent the impaneling of a fair and impartial jury.

Pretrial publicity alone is not a sufficient ground for granting a change of venue. In 21 American Jurisprudence 2d (1981) 640-641, Criminal Law, Section 389 it is stated:

> "As a general proposition, such pretrial publicity, whether of a routine nature or even of an inflamatory nature, has not been recognized as constituting a sufficient basis in itself for granting a motion for a venue change; it generally appears as though some proof of community ill will toward the defendant must be established."

See also, *State* v. *Findley* (1977), 39 Ohio App. 2d 166.

It has long been established in Ohio that the best test to determine if a fair and impartial jury can be obtained is by *voir dire* examination. In *Townsend* v. *State* (1912), 17 Ohio C.C. (N.S.) 380, affirmed without a written opinion in 88 Ohio St. 584, it is stated in the syllabus:

> "The examination of jurors on their *voir dire* affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to guilt of the defendant of those called for examination for jurors are based on newspaper articles, and that the opinions so formed are not yet fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue."

This proposition of law was also followed in *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, where the court stated at 251:

> "It has long been the rule in Ohio that '[t]he examination of jurors on their *voir dire* affords the best test as to whether prejudice exists in the community against the

> defendant, and where it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in absence of a clear showing of an abuse of discretion.' *State* v. *Swiger* (1966), 5 Ohio St. 2d 151 [34 O.O. 2d 770], paragraph one of the syllbabus.
>
> "We believe that generally 'a careful and searching *voir dire* provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.' *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, 98 [2 O.O. 3d 249], vacated in part on other grounds (1978), 438 U.S. 911."

It is not error to impanel a jury who has been exposed to pretrial publicity when they state that they can be fair and impartial and base their verdict on the evidence that is presented at trial. In *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, the court stated at 251-252:

> "In *Lockett*, [*State* v. *Lockett* (1978), 49 Ohio St. 2d 48, reversed on other grounds (1978), 438 U.S. 586], this court reaffirmed our belief that where the record on voir dire establishes that prospective verniremen have been exposed to pretrial publicity but affirmed they would judge the defendant solely on the law and evidence presented at trial, it is not error to empanel such veniremen."

The record reflects that all of the jurors seated and composing the jury indicated during *voir dire* that they could decide the case based on the evidence presented at trial and not from what they may have heard or read in the newspaper.

It should be noted that the appellant had ample opportunity to reject any one of the final jurors during the *voir dire* examination and must have been satisfied since the appellant did not exhaust all of the preemptory challenges that were available.

The record reflects that the appellant only used four preemptory challenges (T.145,168,185,196) where six such challenges were available to remove a person whom the appellant felt would not be fair and impartial. See our opinion of *State* v. *Ruppert* (1984), 14 Ohio App. 3d 74. Thus the seating of a fair and impartial jury was fully possible.

Based on the record of the *voir dire* examination, the trial court did not abuse its discretion when it took the motion for a change of venue under advisement until an examination of the prospective veniremen was conducted, and then impaneled the jury, they all indicating that could return a verdict based solely on the evidence that was presented at trial and not from the newspaper articles they read.

The assignment of error is not well taken.

I. In the first assignment of error in her supplemental brief appellant asserts that:

"I. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL,

"A. FAILED TO REQUEST A CHANGE OF PROSECUTING ATTORNEY BASED ON A CONFLICT OF INTEREST:

"B. FAILED TO DECLINE REPRESENTING DEFENDANT, WHERE THE SAME LAW FIRM REPRESENTED THE PROSECUTOR'S WIFE:

"C. FAILED TO PROVIDE THE DEFENDANT WITH AN IMPARTIAL JURY WHERE DEFENSE COUNSEL ESTABLISHED THAT JURORS DEVELOPED BIASED OPINIONS AGAINST THE DEFENDANT BY READING NEWSPAPER ARTICLES AND BY PERSONAL KNOWLEDGE OF THE DEFENDANT AND/OR HER FAMILY."

In the recent case of *State* v. *Hamblin* (1988), 37 Ohio St. 3d 153, the Supreme Court summarizes the pertinent and applicable principles pertaining to asserted ineffectiveness of counsel. It was there said at 155-156:

> "In Ohio, a properly licensed attorney is presumed competent. *Vaughn* v. *Maxwell* (1965), 2 Ohio St. 2d 299, 301, 31 O.O. 2d 567, 568, 209 N.E. 2d 164, 166. The appellant bears the burden of proving that his trial counsel was ineffective. To carry this burden, appellant must show that counsel made errors so serious that counsel failed to function as the 'counsel' guaranteed by the Sixth Amendment. *Strickland* v. *Washington* (1984), 466 U.S. 668, 687. Appellant must also demonstrate that the deficient performance prejudiced his defense. To establish prejudice, appellant must show that there is a reasonable probability that but for counsel's mistakes, the result of the trial would have been different. *Strickland, supra.*"

We first note a procedural problem in applying these principles. Appellant in support of her position, by terms attached to her brief, attempts to add additional facts to the record.

In *State* v. *Hawley* (1984), 20 Ohio App. 3d 59, in a footnote the court says:

> "However, items attached to an appellate brief are *not* a part of the record below and will not be considered by this court. See *Laman* v. *Marbury* (1982), 69 Ohio St. 2d 274 [23 O.O. 3d 269]; *State* v. *Mitchell* (Feb. 3, 1983) Cuyahoga App. No. 45014, unreported."

See also *Paulin* v. *Midland Mutual Life Ins. Co.* (1974), 37 Ohio St. 2d 109.

None of the added material is properly before this court and cannot be considered by it.

The objection as to the prosecutor asserts a conflict of interest in that he had, on a previous occasion, represented the defendant and her husband. In her testimony at the motion to

suppress, the defendant testified that she and her husband had "used him as a lawyer before", but the prosecutor said "* * * he was sorry, he couldn't, you know represent me and prosecute me at the same time."

It is reasonably clear from the record that on one or two previous occasions, Mr. Seibel, the prosecutor, had done some legal work for the defendant and the victim. There is nothing to indicate this was a general representation, or it was in any way related to the charge herein involved. We find no prejudice to appellant.

As to her defense counsel, Mr. Borland, there is nothing in the record to demonstrate any conflict of interest, the facts asserted being clearly outside the scope of the trial or the motion to suppress. In the absence of such evidence, there is no demonstration of prejudice.

As to the specific assertion as to ineffectiveness in obtaining an impartial jury, this is an issue fully discussed above and we have concluded no prejudice occurred. A fair and impartial jury was, as demonstrated by the record, obtained.

The assignment of error is not well taken.

IV. The fourth assignment of error states:

> "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION FOR A NEW TRIAL."

The motion for new trial was based upon abuse of discretion in overruling the motion for change of venue and for failing to grant the motion to suppress. Both of these items have been previously considered and only as to the motion to suppress is the assignment of error well taken. A further ground is asserted as to misconduct of the prosecutor has been considered and been found to be not well taken, no prejudice having been demonstrated.

Thus we conclude by stating that the trial court erred by failing to grant in full appellant's motion to suppress, and in particular, to suppress the statements made after midnight on February 21, 1986.

We wish to here note that all of the foregoing matters are concerned solely with matters of procedure and due process and have no relation to the underlying issue of guilt or innocence about which we make no statement.

Judgment reversed. Cause remanded for further proceedings.

COLE, MILLER, and EVANS, JJ., concur.

APPENDIX B

The Supreme Court of Ohio
1989 TERM
To wit: July 5, 1989

Case No. 88-1955

STATE OF OHIO,

Appellant,

vs.

TERESA BOOHER,

Appellee.

Appeal From The Court of Appeals

JUDGMENT ENTRY
(Filed August 4, 1989)

This cause, here on appeal from the Court of Appeals for Defiance County, was considered in the manner prescribed by law. On consideration thereof, this cause is dismissed, *sua sponte*, as having been improvidently allowed.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Defiance County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Defiance County for entry.

(Court of Appeals No. CA4868)

/s/ THOMAS J. MOYER
Chief Justice

APPENDIX C

In The Court of Common Pleas of
Defiance County, Ohio

Case No. 4889

THE STATE OF OHIO,

Plaintiff,

vs.

TERESA BOOHER,

Defendant.

OPINION

(Filed May 20, 1986)

This cause came on to be heard upon a motion to suppress all statements made by the defendant on February 20 and 21, 1986 to any law enforcement officers pertaining to the death of defendant's husband, Gary Booher.

The evidence reflects that the defendant's husband, a police officer, employed by the Defiance City Police Department died of a gunshot wound to the head, inflicted in the morning hours of February 20, 1986, while he was in bed at his home. Thereafter, sometime prior to 1:00 p.m., the defendant was taken into custody by a joint team of law enforcement officers consisting of the Defiance County Sheriff's Department, the Defiance City Police Department and at least one member of the Van Wert County Sheriff's Department for questioning. The defendant was given her Miranda warnings initially at 1:07 p.m. and therafter questioned briefly by Detective George Wood of the Defiance City Police Department. Serious interrogation of the defendant did not apparently begin until approximately 3:00 p.m. upon the arrival of Detective Ralph Eversole of the Van Wert County

Sheriff's Department, at which time Det. Eversole and Defiance County Sheriff Dave Westrick began the interrogation of the defendant. Det. Eversole terminated his interrogation at approximately 5:00 p.m., following which Sheriff Westrick continued interrogating the defendant for approximately one more hour. The interrogation ceased from approximately 6:00 p.m. until about 8:00 p.m., at which time a least Sheriff Westrick, his secretary, Pamela Stephens, and Det. Wood interrogated her until, according to Sheriff Westrick's testimony, about 10:00 p.m.

The evidence is not clear as to the exact chain of events between 10:00 p.m. and 12:00 midnight, but during this period of time the defendant was interrogated by at least the following individuals: Prosecutor Peter Seibel, Defiance City Police Chief Shock and Major Jerry Johnson of the Defiance County Sheriff's Department. During this time frame, the defendant requested to talk to an attorney and she was served with an arrest warrant for aggravated murder. The interrogations by Prosecutor Seibel and Chief Shock took place after her request for counsel. Prosecutor Seibel's conversation with the defendant after her request for counsel was solely for the purpose of informing her that although he had represented her and her husband on matters prior to this time that he could not act as her attorney in the present matter and that other counsel would be furnished to her if she so desired. There is no indication in the record as to what Chief Shock discussed with the defendant after her request for counsel.

At approximately 12:00 midnight the defendant was processed and placed in a cell in the Defiance City Jail, and all further interrogation ceased. Prior to midnight the defendant was held in a small interrogation room in the Detective Bureau at all times and was always accompanied by other female employees of the Defiance Police Department while not being interrogated. During this period of time, the defendant's parents, brother and several friends were waiting to see defendant, however neither was the fact communicated to her nor was she afforded any opportunity to visit with anyone other than agents of the state. Also during this time the defen-

dant was always provided with water, coffee, cigarettes and the opportunity to go to the bathroom upon request, however she was not furnished any meals. The record does not indicate that she ever asked for meals however, and it is reasonable to presume that food was not being intentionally withheld from her, given their accomodation of her other requests.

Typically, only those critical portions of the interrogation, where the defendant began to unravel the story of her participation in the shooting have been preserved on tape or by transcript. Even in these brief excerpts, however, there exists an undertone of indications or promises that there would be "help" available for the defendant when she finally told the "true" story.

At approximately 2:00 a.m., February 21, 1986, the defendant told the jail matron during a routine jail check that she wished to talk to Det. Wood. Wood then returned to the Police Department and at approximately 2:15 a.m. met with her back in the interrogation room. At this time Wood again went over the defendant's Miranda rights, emphasizing them very appropriately due to her previous request for counsel, which she wavied in writing.

Wood then proceeded into a full scale interrogation which resulted in the defendant's full confession to the story as Det. Wood believed it to be. This interrogation lasted until 3:15 a.m. and an "aftermath statement" was taken concerning extraneous matters commencing at 3:20 a.m. and lasting approximately ten more minutes.

Defendant contends that the statements taken on the 20th and 21st days of February, 1986 were not voluntary and that such statements should be suppressed because they were taken in violation of her rights under the fourth, fifth and fourteenth amendments to the Constitution.

There is a most extensive body of case law surrounding the issue of the "voluntariness" of confessions under our legal system. These cases however yield no "per se" rule as to what conditions must either exist or be absent in order to make a confession voluntary. It is accepted that the notion of voluntariness must strike a balance between the duty of police of-

ficers to investigate crime and to use those tools necessary and expedient to the end that criminals are prosecuted and punished and the real and serious threat to civilized notions of justice that unfair or overbearing police tactics will result in untrue confessions. Mr. Justice Frankfurter wrote: "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two-hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe* v. *Connecticut* 367 U.S. 568 at 602.

In determining the voluntariness of a particular confession, the reviewing court must assess the totality of the circumstances: both the characteristics of the accused and of the interrogation. Among the negative factors suggested by the cases which will assist in this determination are: phychological coercion *Upshaw* v. *United States* 335 U.S. 410; promises *Bram* v. *United States* 168 U.S. 532; absence of counsel, relatives and friends *Chambers* v. *Florida* 309 U.S. 227, *Anderson* v. *United States* 318 U.S. 350; education or experience of the accused *Reck* v. *Pate* 367 U.S. 433; duration of the questioning, including whether the defendant was deprived of food, refreshment or rest, and whether the questioning was done by police in relays *Frazier* v. *Cupp* 394 U.S. 731.

The factors that the court in this case must reconcile are that the interrogation was lengthy, and conducted by teams of interrogators operating in relays. The defendant was being interrogated by friends and co-workers of her husband, the victim of what they perceived to be a brutal murder. The presence of the prosecuting attorney as an agent of the state, who had also previously represented her privately, and who further felt compelled, after she requested to talk to an attorney, to point out to her that he was not able to represent her, must also be considered. Also, there is the consistent

undertone throughout the entire recorded portions of the interrogations of some vague promise of "help" from the police. Furthermore, the defendant was held incommunicado from waiting family and friends, even though there were substantial breaks in the interrogations lasting up to two hours at a time. And finally, the defendant was interrogated at least by Chief Shock after she requested counsel.

None of these factors would, by themselves, require the conclusion that the defendant's will was overborne and the statements were not made voluntarily. However, the combination of so many of them forces the Court to find that all of the statements made prior to the defendant's incarceration, shortly before midnight of February 20, 1986 were not the product of an essentially free and unconstrained choice by the defendant and must be therefore suppressed.

The next question involves whether the abondonment of the interrogation before midnight, the incarceration of the defendant and her subsequent request to reinstitute dialog with Det. Wood constitutes a "break in the stream of events" as discussed in *Clewis* v. *Texas* 386 U.S. 707, sufficient to shed the taint of the prior unconstitutional action by the agents of the state.

Prior to the *Clewis* case, the Supreme Court held in *Wong Sun* v. *United States* 371 U.S. 471 that inculpatory statements elicited by agents of the state which are the fruit of prior unconstitutional action are generally not admissible, however, if the connection between the prior illegality and the subsequent statements becomes "so attenuated as to dissipate the taint," then the statement will be admissible. *Wong Sun* at 491.

The general statement in *Wong Sun* has been clarified in *Brown* v. *Illinois* 422 U.S. 590 and *Rawlings* v. *Kentucky* 448 U.S. 98 wherein there were suggested criteria to assist the consideration of whether the prior taint has been purged. These criteria are as follows: (1) Miranda warnings; (2) the temporal proximity of the prior taint and the confession; (3) any intervening circumstances; (4) the purpose and flagrancy

of the prior misconduct; and (5) the subsequent voluntariness under a totality of the circumstances test.

In the present situation, Det. Wood did a comendable job of ascertaining that the defendant understood her "Miranda" rights, particulary her right to counsel which she had previously requested. Furthermore, the Court cannot find that the prior misconduct of the police was particularly flagrant nor purposeful, but rather was just a combination of circumstances that on balance indicated that the statements were not voluntarily given.

The issue of temporal proximity is problematical in that there is no clock which will tell us exactly when the effects of a prior taint will wear off. There are certainly instances imaginable where a lapse of days or even weeks would not be sufficient, just as there are probably circumstances where a momentary pause for reflection would be sufficient. In the present case, the Court considers the break of two hours after the termination of the "tainted" interrogation, during which the defendant, not unknowledgeable of the system nor of the people with whom she was dealing, had considerable opportunity to reflect upon the events of the day and her present situation. There is further the intervening circumstance that the defendant, herself, reinitiated the dialog with Det. Wood, at a time where she was under neither real nor imaginable compulsion to make any further kind of a statement.

Given this set of facts, the Court finds that the confession made by the defendant between 2:15 a.m. and 4:00 a.m. on February 21, 1986, was both voluntary and sufficiently removed from the prior tainted statements to be admissible.

Counsel will submit a judgment entry consistent with this opinion within fourteen days to the Court for signiature and filing.

Dated: May 16, 1986

/s/ SUMNER E. WALTERS, Judge

APPENDIX D

EXCERPTS FROM THE SUPPRESSION HEARING TRANSCRIPT OF TERESA BOOHER

[26] ~~QUESTI~~ONING BY MR. SEIBEL:

Q. Now, you were aware later on that night that the offense with which you were being suspected of and with which you might be charged either carried life imprisonment with parole after 20 years, or even if Detective Wood said this, possible death penalty; is that correct?

A. Yes.

Q. You understood the enormity of the potential penalty if you were discovered to have murdered your husband as opposed to an accident having happened?

A. Yes.

[27] Q. And yet when Detective Wood comes back at your request and readvises you of your rights and tells you you can have an attorney, you understood that then; did you not, that you could have an attorney then?

A. Yes.

Q. And you understood that if he asked you anything you didn't like, you didn't have to answer it? You waived those rights; is that correct?

A. Yes, I did.

Q. You knew you didn't have to talk to him. That was one of your rights, it was the third time you had heard those rights advised to you?

A. Yes.

Q. You knew you could have an attorney. Knowing that it was either a death penalty or life imprisonment, you nevertheless chose to waive those rights; did you not, and speak to him?

A. Yes, I did.